Office-Supreme Court, U.S.
FILED
MAR 18 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1430

In the Supreme Court

OF THE

United States

CHARLES ZOSLAW AND JANE ZOSLAW,
Petitioners,

vs.

MCA DISTRIBUTING CORP.;
DOUG ROBERTSON ADVERTISING, INC.;
MTS, Inc.; TOWER ENTERPRISES, INC.;
WARNER/ELEKTRA/ATLANTIC CORP.;
ABC RECORDS, INC.;
POLYGRAM DISTRIBUTION, INC.;
CAPITOL RECORDS, INC.; AND
CAPITOL INDUSTRIES-EMI, INC.,
Respondents.

Brief of the Capitol Companies in Opposition to the Petition for Writ of Certiorari

GEORGE A. CUMMING, JR.
One Market Plaza
Spear Street Tower
Suite 2800
San Francisco, CA 94105
Telephone: (415) 442-0900
Attorney for Respondents Capitol Records, Inc. and Capitol Industries-EMI, Inc.

Of Counsel:
RONALD M. FRIEDMAN
Capitol Records, Inc.
The Capitol Tower
Hollywood, CA 90028
Telephone: (213) 462-6252

BOWNE OF SAN FRANCISCO, INC. • 100 NINTH ST. • S.F., CA 94103 • (415) 864-6500

QUESTION PRESENTED

Faced with massive discovery in a $4,000 antitrust case, respondent Capitol Records "bought peace" by paying petitioners $7,500 in settlement. Capitol then decided not to sell any additional merchandise to petitioners, because of a threat of further litigation voiced by petitioners even as the settlement was being negotiated.

Properly framed, the question is whether this unilateral decision of Capitol Records violated Section 1 of the Sherman Act, 15 U.S.C. § 1. Both courts below held that it did not.

No question at all is presented as to respondent Capitol Industries-EMI, Inc., parent of Capitol Records. It is merely a holding company, and is not mentioned in the opinion below, or in the petition here.

SUBJECT INDEX

	Page
Question presented	i
Statement of the case	2
Reasons for denying the writ	4
Conclusion	5

Index of Authorities

Cases

Bergen Drug Co. v. Parke, Davis & Co., 307 F.2d 725 (3 Cir. 1962) 4

House of Materials, Inc. v. Simplicity Pattern Co., 298 F.2d 867 (2 Cir. 1962) 4

Ostrofe v. H.S. Crocker Co., 670 F.2d 1378 (9 Cir. 1982), vacated and remanded 459 U.S. ....., 51 U.S. Law Week 3363 (February 28, 1983) 4

Zoslaw v. CBS, Inc., 1978-2 Trade Cases (CCH) ¶ 62,269 (N.D. Calif. 1978) 3-4

Statutes

Robinson-Patman Act § 13(a) 2

Sherman Act § 1 3

No. 82-1430

In the Supreme Court

OF THE

United States

CHARLES ZOSLAW AND JANE ZOSLAW,
Petitioners,

VS.

MCA DISTRIBUTING CORP.;
DOUG ROBERTSON ADVERTISING, INC.;
MTS, Inc.; TOWER ENTERPRISES, INC.;
WARNER/ELEKTRA/ATLANTIC CORP.;
ABC RECORDS, INC.;
POLYGRAM DISTRIBUTION, INC.;
CAPITOL RECORDS, INC.; AND
CAPITOL INDUSTRIES-EMI, INC.,
Respondents.

Brief of the Capitol Companies in Opposition to the Petition for Writ of Certiorari

This brief is submitted by respondents Capitol Records, Inc. ("Capitol") and its parent, Capitol Industries-EMI, Inc.[1]

The opinion below is now reported in 693 F.2d 820 (9 Cir. 1982). As here material, it affirms a summary judgment for Capitol, granted by the district court in an opinion dated September 26, 1978. That opinion is unofficially reported *sub nom, Zoslaw v. CBS, Inc.*, 1978-2 Trade Cases (CCH) ¶ 62,269 (N.D. Calif. 1978).

---

[1]All parties are listed in the caption. We advise the Court, per its Rule 28.1, that respondent Capitol Industries-EMI, Inc. is a wholly-owned subsidiary of THORN EMI, Ltd., a British company.

STATEMENT OF THE CASE

Petitioners owned a retail phonograph record store in a suburb of San Francisco. They were not franchisees or distributors, but merely purchased records order-to-order from various suppliers. In 1975, petitioners sued Capitol and most of the nation's other record manufacturers, alleging price discrimination under Section 2(a) of the Robinson-Patman Act, 15 U.S.C. § 13(a). The complaint also contained allegations based upon the Sherman Act, but as the court below said: the "Sherman Act allegations come through as an attempt to breathe new life into [petitioners'] Robinson-Patman claims, by recasting them in the form of a conspiracy. . . ." (Pet.App. A-34, 35).

Capitol's gross sales of phonograph records to petitioners averaged only $3,800 per year, and the complaint sought $4,000 in damages. Capitol was promptly served with several sets of sweeping interrogatories, of the kind so frequently associated with the phrase "protracted antitrust litigation." Because of the enormous expense of responding to this discovery, and considering the very small amount of merchandise that Capitol had sold, it reluctantly opened settlement negotiations.

During these negotiations, petitioners' counsel stated that Capitol's prices violated the Robinson-Patman Act, and warned of further litigation unless Capitol changed its prices to his liking. Accordingly, counsel offered only a limited settlement, *viz.:* one enabling Capitol to "buy peace" (in his words) from the claims and discovery burdens of the pending litigation.

On June 10, 1975, Capitol settled the case by paying petitioners $7,500, a sum about equal to their gross purchases from Capitol in the preceding two years. The agreement released the Capitol companies from all claims existing as of June 10, 1975. However, consistent with the threat of further litigation voiced by counsel for petitioners during the settlement negotiations, the agreement also provided that it "shall not prejudice plaintiffs' rights to sue defendant for damages or other relief arising out of acts or omission which occur after the date of execution of this agreement." As the district court observed: "Both sides recognized that plaintiffs were unhappy with Capitol's pricing policies and that further litigation was a possibility."[2]

Having settled the case and wiped the slate clean, Capitol made a unilateral business decision not to sell any additional merchandise to petitioners. An amended complaint was promptly filed; it charged that Capitol's decision to discontinue sales violated Section 1 of the Sherman Act, 15 U.S.C. § 1. In 1978, after affording petitioners a full opportunity to conduct discovery, the district court granted a summary judgment for Capitol, phrasing its ruling thus:

> "[Capitol] has offered valid reasons, which are not anti-competitive, for its unilateral decision to refuse to deal with plaintiffs, including its small financial return from plaintiffs following its settlement therewith, and the prospect of continued litigation."[3]

The court below affirmed, holding that "Capitol's acknowledged purpose of avoiding future litigation whose costs exceeded the benefits from doing business with appellants

---

[2] 1978-2 Trade Cases (CCH) ¶ 62,269, at page 75,672.

[3] *Id.*, page 75,673.

qualified as a legitimate business reason for refusing to deal." (Pet. App., pp. A-57, 58).

REASONS FOR DENYING THE WRIT

This case presents no novel or conflicting principle calling for the attention of this Court. The court below found itself in complete agreement with the views expressed by the Second Circuit in *House of Materials, Inc. v. Simplicity Pattern Co.*, 298 F.2d 867 (1962), from which it quoted with approval (Pet.App. A-57). The *Simplicity Pattern* case *might* be characterized as one of "retaliatory" termination, but if so, then the present case is *a fortiori*. As the district court noted: "it is by no means clear that Capitol's conduct in this case can be assimilated within that doctrine. This is not the case of a defendant who terminates after the filing of a lawsuit, but rather of a defendant who settles the lawsuit, and then, with what must be considered a clean slate, refuses to deal in order to avoid the possibility of another lawsuit."[4]

Both courts below correctly distinguished the present case—a suit for damages—from decisions involving the discretionary exercise of a court's equitable powers to maintain the *status quo pendente lite*, and *Bergen Drug Co. v. Parke, Davis & Co.*, 307 F.2d 725 (3 Cir. 1962), cited at p.58 of the petition, is merely one of those. Also cited is *Ostrofe v. H.S. Crocker Co.*, 670 F.2d 1378 (9 Cir. 1982). But it is not pertinent at all, and the judgment there was vacated by this Court on February 28, 1983. (No. 82-174, 459 U.S. ....., 51 U.S. Law Week 3363).

---

[4]1978-2 Trade Cases (CCH) ¶ 62,269, at page 75,673.

As for the claim that Capitol refused to sell pursuant to a "conspiracy" with others, both courts below found that allegation to be unsubstantiated by any evidence. The petition merely rehashes the evidence peculiar to the case at bar, and thereby demonstrates the lack of general importance that is the touchstone of certiorari jurisdiction.

CONCLUSION

We respectfully submit that the petition for certiorari should be denied.

Dated: San Francisco, California
March 17, 1983

GEORGE A. CUMMING, JR.
Attorney for Respondents
Capitol Records, Inc.
and Capitol Industries-
EMI, Inc.

Of Counsel:
RONALD M. FRIEDMAN